Department of Justice

STATEMENT

OF

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BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

THE VOTING RIGHTS ACT: SECTION 5 OF THE ACT –
HISTORY, SCOPE, AND PURPOSE

PRESENTED ON

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Chairman Chabot, Ranking Member Nadler, distinguished members of the Subcommittee:

Good morning. I am Brad Schlozman, Acting Assistant Attorney General of the Civil Rights Division at the Department of Justice. Thank you for the opportunity to appear before you today. The President has directed the full power and might of the Justice Department to enforce the Voting Rights Act and to preserve the integrity of our voting process. The Voting Rights Act has been enormously successful, but our work is never complete. For this reason, this Administration looks forward to working with Congress on the reauthorization of this important legislation.

It is my privilege this morning to provide you with an overview of the Justice Department's enforcement of section 5 of the Voting Rights Act, one of the special provisions of the Act that is slated to expire in 2007. As the Committee knows, many other important provisions of the Act, including section 2's prohibition against discrimination in voting and section 11's prohibition against voter intimidation, are permanent in nature. However, I have been asked to confine my testimony to section 5.

The Attorney General has assigned responsibility for enforcement of the Voting Rights Act to the Civil Rights Division, which in turn has delegated most enforcement functions to the Division's Voting Section.[1] Section 5 represents an important part of this work. Although many of you no doubt are well versed in the intricacies of section 5, I will outline this provision briefly as a primer for those who are not and as a refresher course for those of you who already are experts in this area of law.

Section 5 mandates that all covered jurisdictions seek pre-clearance of any new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." This approval can be sought administratively from the Attorney General or through the judicial route by filing a declaratory judgment action in the United States District Court for the District of Columbia. In the latter case, the Attorney General litigates the declaratory action and either supports or opposes the court's approval of the voting change at issue. However, under both approaches, the voting change – whether it be a new law, ordinance, regulation, or procedure -- cannot be implemented until the administrative or judicial approval is secured.

Section 5's coverage is extremely broad. As the Supreme Court noted in *Allen v. State Bd. of Elections*, 393 U.S. 544, 566 (1969), "Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way." There is no *de minimis* exception. In other words, while voting changes as significant as a legislative redistricting obviously come to us for pre-clearance review, so too do such minor changes as a half-block

[1] 28 C.F.R. § 51.3.

movement of a polling place, a fifteen minute extension of polling hours, and a municipal annexation of completely unpopulated land.

In determining which jurisdictions are subject to the section 5 pre-clearance requirements, the Voting Rights Act contains a formula in subsection 4(b) that is predicated on historical voter turnout as well as the presence of certain discriminatory voting tests or devices.[2] Specifically, a jurisdiction is covered under section 5 if (i) less than 50% of a jurisdiction's voting age population either was registered to vote *or* actually voted in November 1964, November 1968, or November 1972; and (ii) the Attorney General determines that the jurisdiction maintained certain "tests or devices," as defined by subsection 4(c) of the Act, in November 1964, November 1968, or November 1972. There are 16 States – 9 in whole and 7 others in part – that meet this formula. The entire States of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia are covered, although 10 counties and cities in Virginia have "bailed out"[3] of coverage in recent years. Meanwhile, certain counties and townships are covered in the States of California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota.[4] Interestingly, a number of southern states -- including Arkansas, Tennessee, and West Virginia -- are not covered at all by Section 5.

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[2]42 U.S.C. § 1973b.

[3]Subparagraph 4(a)(1) of the Voting Rights Act, 42 U.S.C. § 1973b(a)(1), contains detailed procedures by which a covered jurisdiction may secure a declaratory judgment excusing the jurisdiction from further compliance with section 5. This procedure frequently is referred to as the "bail out" provision.

[4]28 C.F.R. Appendix to Part 51 – Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as amended.

For reasons of expense and timing, the vast majority of voting changes by covered jurisdictions are submitted to the Attorney General for administrative review. The Voting Section of the Civil Rights Division receives roughly 4,000-6,000 submissions annually, although each submission may contain numerous voting changes that must be reviewed.[5] Redistricting plans are only a small portion of those submissions. For example, in Calendar Year 2003, we received a total of 4,628 submissions, 400 of which were redistricting plans. In Calendar Year 2004, we received 5,211 submissions, 242 of which involved redistricting plans. In Calendar Year 2005, we already have received 3,811 submissions (as of October 17th), 88 of which have been redistricting plans. Perhaps not surprisingly, the number of section 5 submissions sent to the Department of Justice tends to reach its apex two years after the national Census, the point at which jurisdictions have the demographic data necessary to redraw their political districts. For example, in 2002 we received 5,910 submissions, of which 1,138 were redistricting plans. Similarly, in 1992, we received 5,307 submissions, 974 of which involved redistricting plans.

Our function in evaluating section 5 submissions is, in the words of the Supreme Court, merely "to insure that no voting-procedure changes [are] made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Miller v. Johnson*, 515 U.S. 900, 926 (1995) (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)). Stated differently, we examine whether the purpose or effect of a voting

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[5]A chart denoting the number of annual submissions received by the Civil Rights Division pursuant to section 5 each year is attached hereto.

change is to put racial minorities in a position inferior to the one they occupy under the status quo, as compared to non-minorities, *vis a vis* their ability to elect their candidates of choice. Impressively, the outstanding career attorneys in our Voting Section undertake this often highly complex examination in a brief, sixty-day period of time, as is required under the statute.

Employing this standard over the last 40 years, we have found retrogression in an extremely small number of cases. Since 1965, out of the 120,868 total section 5 submissions received by the Department of Justice, the Attorney General has interposed an objection to just 1,401. And in the 10 ten years, there have been only 37 objections. In other words, the overall objection rate since 1965 is only a hair over 1%, while the annual objection rate since the mid-1990's has declined even more, now averaging less than 0.2%. This tiny objection rate reflects the overwhelming – indeed, near universal – compliance with the Voting Rights Act by covered jurisdictions.

Recently, the Supreme Court revised the standard applicable in section 5 retrogression inquiries. *See Georgia v. Ashcroft*, 539 U.S. 461 (2003). The Court in that decision expanded the factors to be considered in the retrogression determination by examining all the relevant circumstances, which include a review of the minority voters' ability to elect candidates of their choice, the feasibility of devising a non-retrogressive alternative plan, and the extent of minority voters' opportunity to participate in and "influence" the political process. In implementing that opinion, the attorneys and analysts in the Division's Voting Section continue to conduct wide-ranging investigations into all of the circumstances surrounding voting changes, including

soliciting comments and opinions from the affected community, and undertaking complex statistical analyses.

The fruits of our efforts in enforcing the Voting Rights Act have been dramatic. Indeed, at the time the Voting Rights Act was first passed in 1965, only one-third of all African-American citizens of voting age were on the registration rolls in the Act's covered jurisdictions, while two-thirds of eligible whites were registered. Today, African-American voter registration rates not only are approaching parity with that of whites, but actually have exceeded that of whites in some areas, and Hispanic voters are not far behind. Forty years ago, the gap in voter registration rates between African-Americans and whites in Mississippi and Alabama ranged from 63.2 to 49.9 percentage points. For example, only 6.7% of African-Americans in Mississippi were registered, in comparison with 69.9% of whites.[6] Yet by the 2004 general election, the Census Bureau reported that a higher percentage of African-Americans were registered to votes than whites (76.2% versus 73.6%). Meanwhile, in Alabama in 2004, African-Americans reported registering at a rate only 1.7 percentage points below that of whites (73.2% versus 74.9%). Moreover, the Census Bureau also recorded an increase in turnout for African-Americans in the South from 44% in 1964 to 53.9% in 2000.[7]

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[6] *The Voting Rights Act: Ten Years After*, U.S. Civil Rights Commission, January 1975, page 43.

[7] *Current Population Survey*, U.S. Census Bureau.

Finally, enforcement of the Voting Rights Act has radically increased the opportunity of minority voters to elect representatives of their choice. Virtually excluded from all public offices in the South in 1965, minority elected officials are now substantially present in State legislatures and local governing bodies throughout the region. For example, the number of African-American elected officials has increased dramatically during the life of the Voting Rights Act, from only 1,469 in 1970 to 9,101 in 2001.[8] In fact, many covered States, such as Georgia and Alabama, have more elected African-American officials today than most that are not covered by section 5.

In conclusion, the Voting Rights Act can be characterized accurately as one of the most successful pieces of civil rights legislation ever adopted by the Congress. The Department of Justice is proud of the role it plays in enforcing this statute and we look forward to working with Congress during these reauthorization hearings.

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[8] *Black Elected Officials – A Statistical Summary 2001,* Joint Center for Political and Economic Studies, Table 1, page 13.